IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1971

NO. 71-333

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, Petitioner,

vs.

UNITED STATES OF AMERICA and ETHEL OLSON and LILLIAN SEARLE as Co-Administratrices of the Estate of Sarilla L. Whitlock, Deceased, Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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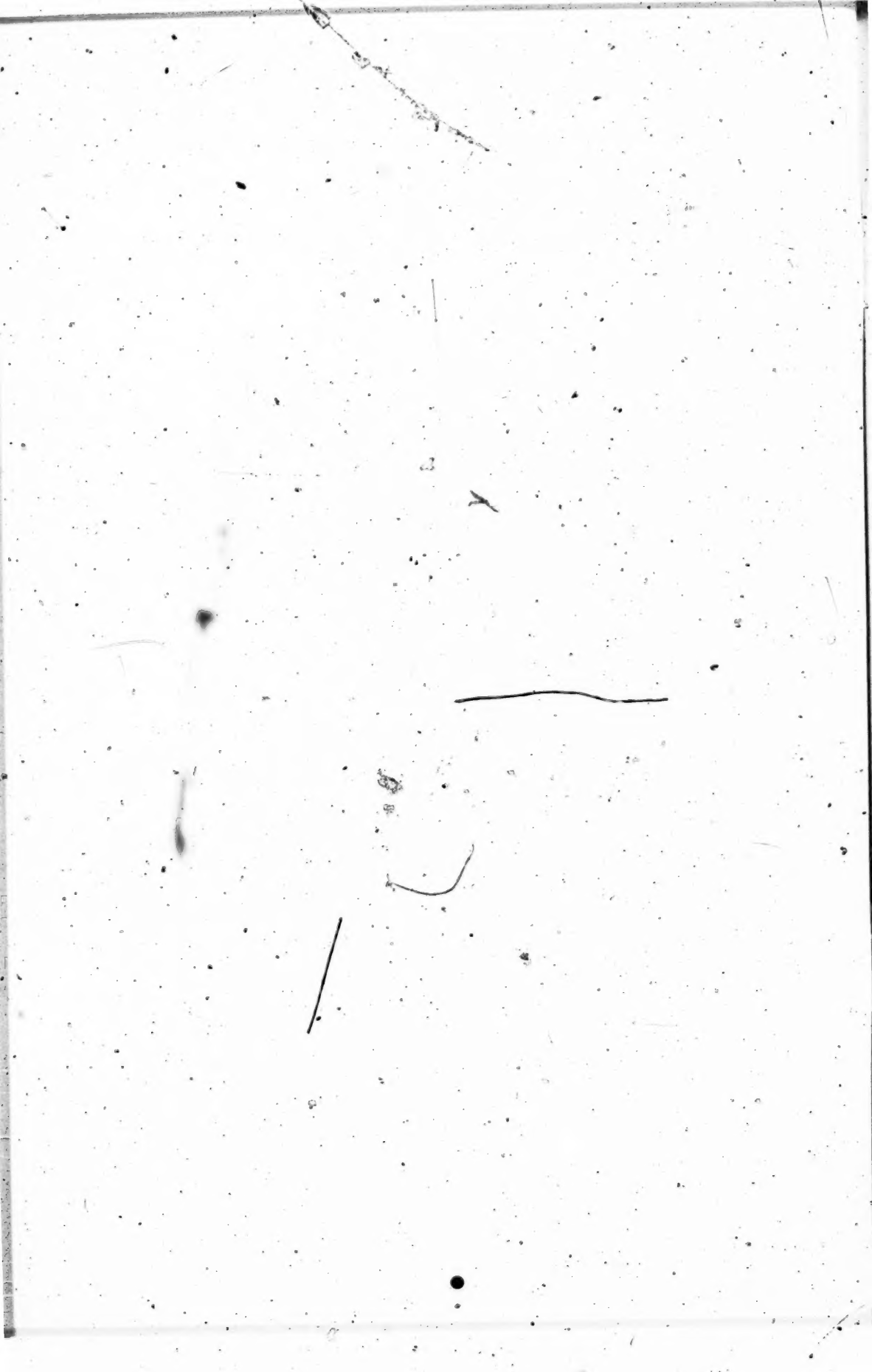
QUESTION PRESENTED

Petitioner has not properly stated the issues. This case does not involve the termination of a conservator's authority nor does it involve the authority of a conservator to endorse any check. The sole question here presented is whether Mr. Houlihan, as conservator of Mrs. Whitlock's estate, had the authority to redeem the bonds and to cash those checks issued in redemption thereof. Moreover, Petitioner's attempted distinction between the authority to redeem the bonds and the authority to endorse the checks is groundless; surely, the latter could not exist without the former.



STATEMENT OF THE CASE

A few addenda to Petitioner's statement of this case are necessary so that the Court may fully understand the extent of Mr. Houlihan's wrongful conduct, which culminated in the forgeries of Mrs. Whitlock's signature.

The reduction of the conservatorship bond by the California probate court was not made merely on Mr. Houlihan's representation that he would deposit the savings bonds in United California Bank; such deposit was an express condition to the issuance of the reduction order. Thus, as of the date of the reduction order, Mr. Houlihan's authority over the bonds ceased completely. Any action on the part of Mr. Houlihan with respect to such bonds other than depositing them was wrongful.

The redemption of the savings bonds by Mr. Houlihan was as attorney and not as conservator. Similarly, the deposits by Mr. Houlihan of the checks representing the proceeds (each of which was payable to Mrs. Whitlock and not to Mr. Houlihan as conservator) were not in a trustee or conservatorship account, but in an overdrawn personal account. There were no endorsements by Mr. Houlihan as conservator, and Mrs. Whitlock's signature was simulated. One of the checks was deposited in an unrelated estate account (Estate of John Joseph Betmon) to cover Mr. Houlihan's prior misappropriations from that estate; the other checks were deposited in Mr. Houlihan's personal accounts. No mention of the conservatorship was made in any of these endorsements.

REASONS FOR DENYING THE WRIT

1. The decision below, in holding the conservator without authority to redeem the bonds or endorse the checks, correctly applied California law.

As pointed out by the Court of Claims in its opinion, Mr. Houlihan was without authority for two reasons: because he violated the court order and under general principles of California conservatorship law.

(a) The conservator was without authority because he violated the court order.

The specific order of the California probate court reducing the conservatorship bond was conditioned on Mr. Houlihan's express representations in his petition for reduction of the bond that he would deposit the bonds in the United California Bank, "subject to withdrawal only upon further order of this Court." Thus, Mr. Houlihan had no authority with respect to the bonds except to deposit them. He had no authority to redeem the bonds except by order of the court. In fact, he had no authority even to have them in his possession. The redemption of the bonds and the endorsement of the checks representing the proceeds of the bonds were thus in direct violation of the conditions upon which the court based its order reducing the bond.

Contrary to Petitioner's contention, such court order involved neither termination nor suspension of Mr. Houihan's authority; it merely imposed a reasonable condition upon the exercise thereof. When he violated that condition, Mr. Houlihan clearly exceeded his authority.

(b) The conservator was without authority under well settled principles of California law pertaining to conservatorships.

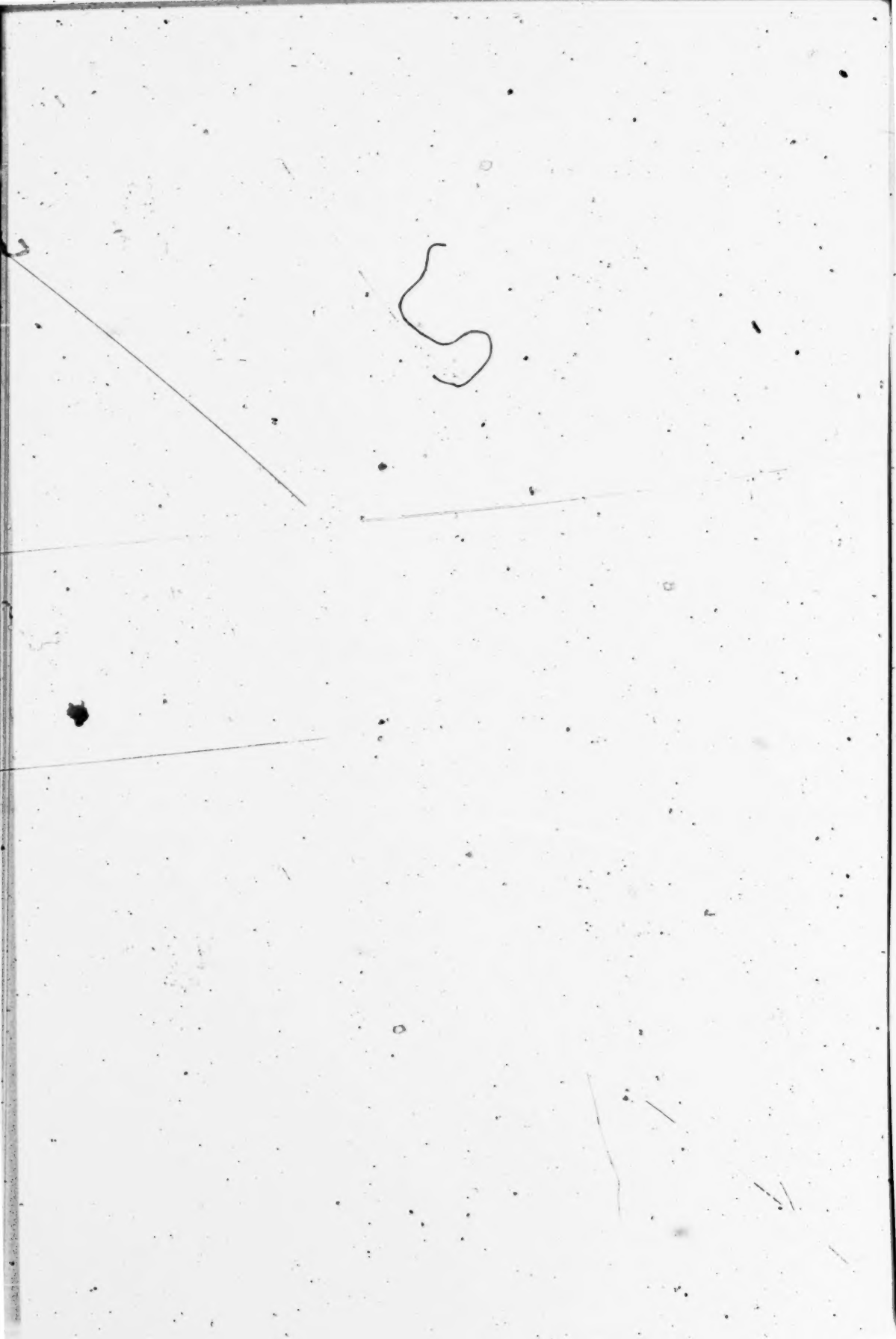
California Probate Code Section 1852 grants to conservators the same powers as are given to a guardian, "and if granted by the court, the additional powers authorized by Section 1853 of this code" (Emphasis added). The additional powers of Section 1853 include, inter alia, the power

> ***[T]o take, collect and hold the property of the conservatee; to contract for the conservatorship and to perform outstanding contracts and thereby bind the conservatorship estate;***to sell at public or private sale;***to exchange conservatorship property;***

In order to exercise Section 1853 powers an order of the probate court is required, after application, notice, and hearing. Such additional powers must also be set forth on the face of the letters of conservatorship. These requirements were not complied with and no such additional powers were granted to Mr. Houlihan by the court. Furthermore, no such additional powers were set forth on the face of the letters of conservatorship. The Court of Claims properly concluded that Mr. Houlihan derived no authority from Section 1853.

The clear import of Sections 1852 and 1853, read together, is that the general powers given by Section 1852 do not encompass the powers listed specifically under Section 1853. Powers would not be given under Section 1853 if they had already been granted in Section 1852. Thus, since the authority to redeem bonds and cash checks is derived from Section 1853, it cannot be derived from Section 1852.

Nor do the guardianship provisions incorporated by Section 1852 aid petitioner. The general powers and duties of



a guardian are found in California Probate Code, Sections 1500 through 1540. None of these sections give a guardian the right to sell or redeem bonds and to cash the checks issued in payment thereof without a court order or without court approval. In fact, these sections specifically require court approval. Section 1530 reads in part as follows:

> If the income of an estate under guardianship is insufficient for the support, maintenance and education of a ward***or if the personal estate and the income from the real estate is insufficient to pay his debts, or if it is for the advantage, benefit and best interest of the estate or ward ***his guardian may sell any of his real or personal property, or mortgage or give a deed of trust upon any of his real property for any such purposes, subject to authorization, confirmation or direction by the Court as hereinafter provided (Emphasis added).

Not only did Mr. Houlihan fail to obtain court authorization, but there was no insufficiency of income for the support of Mrs. Whitlock as a basis for such authorization as contemplated by the statute.

Similarly, an exchange of property by the conservator, acting under general guardianship powers would require court approval under Section 1540, which reads in part:

> When property can be exchanged to the advantage and best interest of the ward and such members of his family as he is legally bound to support and maintain, after hearing before the court, conveyances to effectuate such exchange may be executed to the person with whom such exchange is made by the guardian*** (Emphasis added).

California Appellate Courts have interpreted the law to mean that court approval is necessary to give a guardian

authority to sell the property of his ward. In Katz v. Greeninger, 96 Cal.App.2d 245, 249; 215. P.2d 121, 124 (1950), the court said, "While the guardian has the right of possession and control, the property is said to be 'in custodia legis' and subject to the orders of the court." The court there adopted the view that a guardian is without power, in the absence of a court order, to withdraw funds from the ward's estate if the withdrawal is not needed for the support of the ward. Redemption of the bonds was not needed for the support of Mrs. Whitlock; her average monthly income during the conservatorship proceeding was $850.00, while the average monthly expenditures were $500.00. The court in Katz further stated: "But even in those cases which permit a withdrawal for maintenance the better reasoned ones tie the power of the guardian to the supervision and control of the court" (Ibid.). In Guardianship of Wood, 193 Cal.App.2d 260, 266; 14 Cal.Rptr. 147, 151 (1961), the court stated: "If the income from the ward's property then became insufficient for the ward's support and maintenance, the guardian's remedy consisted of an application to the court; she could sell any of the ward's real or personal property: 'subject to authorization, confirmation or direction by the court***' (Probate Code §1530)" (Emphasis added).*

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* The case cited by petitioner, Southern Trust and Commercial Bank v. San Diego Savings Bank, 45 Cal.App. 294; 187 Pac. 435 (1919), is clearly distinguishable. This case involved the cashing of a check by a guardian two days before letters of guardianship issued but after the order of appointment and posting of bond. The only disputed issue was the drawing of the check before the issuance of letters of guardianship. The decision does not decide the issue of the guardian's general authority to issue checks on a proper guardianship account and does not deal with endorsement in the incompetent's name of checks by the guardian without mention of the guardianship.

2. There are no important federal questions here involved.

Petitioner contends that if the decision of the court below is allowed to stand, banks and others who cash Treasury checks would be put under an unconscionable burden and the very negotiability of Treasury checks would be placed in jeopardy. A review of the facts, however, clearly shows that such was far from the case in this action.

The undisputed facts are that Mr. Houlihan did not endorse the checks as conservator. In two instances, only the simulated signatures of Mrs. Whitlock appear. In two other instances, the simulated signature of Mrs. Whitlock is followed by Mr. Houlihan's signature as a blank endorsement. There is absolutely no evidence whatsoever that Petitioner was relying upon any conservator's powers to endorse. In fact, the inference is clear that had the bank known of the conservatorship relationship of Mr. Houlihan, as would have been revealed by a proper endorsement in his representative capacity, it would have been alerted to transactions and would have avoided the loss. Had the check been endorsed in the usual and proper form, "Sarilla L. Whitlock by John C. Houlihan Conservator" and deposited as it was in Mr. Houlihan's personal account, which was overdrawn, Petitioner would have been charged with notice of breach of fiduciary duty and would have been denied the status of a holder in due course under California Commercial Code Section 3304(2). Moreover, the form of the endorsement was not only inconsistent with Mr. Houlihan's representative capacity, but contrary to the Treasury Department's regulations in Title 31 Code of Federal Regulations Section 360.3, prior to their amendment in 1970.

It is thus clear that Petitioner was under no "unconscionable burden," nor, indeed, any burden other than to accept checks with proper endorsement, the same burden that Petitioner has as respects all checks, and not just Treasury checks.*

CONCLUSION

Because the Court of Claims properly applied California law and because there are no significant Federal questions here involved, the petition for writ of certiorari should be denied.

October 1, 1971.

Respectfully submitted,

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Of Counsel

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* Petitioner's citation of Oquendo v. Federal Reserve Bank of New York, 98 F.2d 708 (2d Cir. 1938), begs the very question at issue here--the question of Mr. Houlihan's authority--for Oquendo involved an express, general power of attorney to, e.g., "endorse any check or other medium of payment". (98 F.2d at 709).